STATE OF MICHIGAN

COURT OF APPEALS

SUNIL KUMAR MUKHERJEE,

Plaintiff-Appellant,

v

ABN AMRO NORTH AMERICA, d/b/a STANDARD FEDERAL BANK,

Defendant-Appellee.

UNPUBLISHED
May 11, 2004

No. 246909
Oakland Circuit Court
LC No. 02-040101-CZ

Before: Fitzgerald, P.J. and Jansen and Talbot, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendant's motion for summary disposition on plaintiff's age discrimination, retaliatory discharge, and breach of contract claims. We affirm.

Plaintiff was sixty-six years old when defendant hired him in 1996. During plaintiff's employment with defendant, he served in a variety of positions, including purging mortgage papers. Plaintiff wanted to advance his career, so he applied for other positions within defendant's organization, but, according to plaintiff, these were filled with younger people who had less education than him. One position that plaintiff applied for was that of a supervisor position in the cashiering department. Plaintiff was not offered this position, and, according to plaintiff, the position was given to an employee that he had trained.

On January 31, 2001, plaintiff sent a letter to Jim Wagener, vice president of defendant's human resources department. In this letter, plaintiff stated, in pertinent part:

> I have been working in the cashiering department for more than four and a half years and I feel because of my age Title VII of the Michigan Civil Rights Act and Federal Government Equal Employment Opportunities Act have been violated. As I am the seniormost experienced employee in the Cashiering Department, I trained all temporary employees, including Keisha Ellis, who became permanent about a year ago. To my utter surprise when she was made permanent, Veronica told me and Ray Berg, who resigned last year in July, that Keisha would be the senior clerk. This cut me to the quick, as she is not educated like me, did not acquire experience, her knowledge of the job was infinitesimal,

> but because of her young age she was illegally given a higher position and higher pay, which is ultra-vire of the above Acts.

Approximately one week after receiving this letter, Wagener and plaintiff's supervisor, Veronica Allen, signed an unsatisfactory review for plaintiff which stated that plaintiff continued to make errors in his work and became overly defensive and argumentative when his performance issues are discussed with him.

In the spring of 2001, Donna Yearego was asked to perform a study of defendant's mortgage cashiering department. The purpose of the study was to make the processes in the mortgage cashiering department more efficient. Yearego stated that she observed plaintiff working as a mortgage cashier, and that she was "unable to perform a thorough study on [plaintiff] because he worked so inefficiently by taking too many unnecessary steps. Moreover, he was unreceptive to suggestions on how to increase his performance, and also would not take direction from his supervisor, Veronica Allen."

On November 30, 2001, Sylvia Baker, the senior vice president for defendant and director of the human resources department, met with plaintiff, Allen, and Allen's supervisor, Kathy Burton. According to Baker, she attempted to explain to plaintiff the importance of meeting production standards and working cooperatively with his supervisors. Baker stated that "plaintiff refused to agree to do so." Baker further stated that because these issues were not resolvable, she advised plaintiff at the end of the meeting that his employment was terminated.

Plaintiff filed suit alleging age discrimination, retaliatory discharge, and breach of contract. Defendant moved for summary disposition pursuant to MCR 2.116(C)(10). The trial court dispensed with oral argument, and in a written opinion and order granted defendant's motion for summary disposition. The trial court found that plaintiff failed to establish that he was qualified for the position of mortgage cashier. The trial court also found that there was no causal connection between plaintiff's January 2001 letter to Wagener and his discharge in November 2001.

This Court reviews a grant of summary disposition de novo to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). "A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint." *Id.* at 120. In evaluating a motion brought under this section, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party. *Id.* "Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law." *Id.*, citing MCR 2.116(C)(10); *Quinto v Cross & Peters Co*, 451 Mich 358; 547 NW2d 314 (1996).

In some cases, direct evidence may be used to prove unlawful discrimination. *Hazle v Ford Motor Co*, 464 Mich 456, 462; 628 NW2d 515 (2001). However, in many cases, as in this case, no direct evidence of impermissible bias was presented. *Id.* Therefore, "[i]n order to avoid summary disposition, the plaintiff must then proceed through the familiar steps set forth in *McDonnell Douglas Corp v Green*, 411 US 792, 802-803; 93 S Ct 1817; 36 L Ed 2d 668 (1973)." *Id.* Under the *McDonnell Douglas* framework, a plaintiff must offer a prima facie case of discrimination. *Id.* at 463. The plaintiff must prove, by a preponderance of the evidence, that

(1) he or she was a member of the protected class, (2) he or she suffered an adverse employment action, (3) he or she was qualified for the position, and (4) the job was given to another person under circumstances giving rise to an inference of unlawful discrimination. *Id.*

The trial court, in the present case, stated that it was undisputed that plaintiff was a member of a protected class and that he suffered an adverse employment action, thus, satisfying prongs one and two. See *Hazle, supra* at 463. However, the trial court found that plaintiff failed to meet the third prong of the above test -- that he was qualified for the position. The trial court continued:

> "An employee is qualified if he was performing his job at a level that met the employer's legitimate expectations." *Town v Michigan Bell Telephone Co,* 455 Mich 688, 699; 568 NW2d 64 (1997). In this regard, Plaintiff's previous education and work experience, and the mere fact that he was hired are irrelevant to this determination. However, the only evidence that Plaintiff presented that he adequately performed his job was his own opinion. When the burden of proof at trial would rest on the nonmoving party, the nonmovant must, by documentary evidence, set forth specific facts showing that there is a genuine issue for trial. *Quinto, supra,* 362. Thus, Plaintiff fails to establish that he was qualified for his position, particularly in light of the affidavits of his supervisors, Sylvia Baker, Veronica Allen and Kathy Burton, who all attest that Plaintiff's job performance was unsatisfactory, that he was asked to meet production standards and he refused to do so. Summary disposition shall be granted on Plaintiff's age discrimination claim.

In *Cicero v Borg-Warner Automotive, Inc,* 280 F3d 579 (CA 6, 2002), the Sixth Circuit addressed whether the plaintiff put forth enough evidence for a reasonable jury to find that the plaintiff had met the prima facie requirements, including whether he met the legitimate expectations of his employer. The court cited *Town, supra,* for the proposition that an employee is qualified if he was performing the job at a level that met his or her employer's legitimate expectations. *Id.* at 585. "'To establish that he was qualified a complainant must show that he was doing his job well enough to rule out the possibility that he was fired for inadequate job performance, absolute or relative.'" *Id.* (citations omitted). The court stated that it must evaluate whether a plaintiff established his qualifications independent of the employer's proffered nondiscriminatory reasons for the discharge. *Id.* The court concluded that when viewed independently of Borg-Warner's proffered reason, the plaintiff offered sufficient evidence for a reasonable jury to find that he was qualified for his position. *Id.* The court looked at the fact that before working for Borg-Warner, the plaintiff worked as the human resources manager of Federal Mogul and as the director of labor relations for the Detroit Newspaper Agency. *Id.* at 585-586. The court also noted that during the plaintiff's employment with Federal Mogul and Borg-Warner, he received good evaluations and merit bonuses. *Id* .at 586. The court stated that while plaintiff's prior work history was not probative, common sense dictated that it was relevant at the prima facie stage for determining whether an employee had at least the minimum attributes needed to perform the position. *Id.* The court stated that "[e]mployers regularly consider a potential employee's prior work experience to decide whether that individual is qualified for a position." *Id.*

Based on *Cicero,* we find that the trial court erred when it failed to consider plaintiff's qualifications (i.e., his education and work history). However, upon a review de novo, after reviewing the evidence offered by plaintiff, as well as that provided by defendant, we conclude that plaintiff did not establish that he was qualified for the mortgage cashier position. In plaintiff's response to defendant's motion for summary disposition, he stated that his education and work experience, in and of itself, satisfied the elements necessary to establish a prima facie case of age discrimination. While plaintiff's resume demonstrates that he has a background in the area of finance, it does not appear that such knowledge was necessary for the position in question. In Allen's affidavit, she stated that a mortgage cashier position does not require a college or any specialized training, as it is essentially an entry level position. Rather, it appears that the mortgage cashier position required data entry skills. Unlike the plaintiff in *Cicero, supra,* whose prior experience was in the same area as the position in which he was fired, i.e., as a human resources manager, plaintiff does not have prior experience as a mortgage cashier or in data entry.

In *Cicero, supra,* the court also looked at the fact that the plaintiff received merit bonuses. The court stated that the merit increase policy included guidelines explaining what the various increases mean, and that the 3.7 percent increase for the 1996 performance year indicated that Cicero's performance "exceeded job requirements." *Cicero, supra* at 586. In the present case, plaintiff submitted his affidavit, where he stated that he received several awards and certificates for his job performance with defendant. Unlike the information regarding the bonuses in *Cicero,* the record does not indicate when plaintiff received these alleged awards, or why he received them. We note that plaintiff attached to his appellate brief a copy of a gift certificate and a premiere choice award he allegedly received for exceeding quotas and for his outstanding performance. However, these were not submitted below. This Court only considers what was properly presented to the trial court before its decision on the motion. *Pena v Ingham Co Rd Comm,* 255 Mich App 299, 310; 660 NW2d 351 (2003) citing *Sprague v Farmers Ins Exch,* 251 Mich App 260, 265; 650 NW2d 374 (2002); *Long v Chelsea Community Hosp,* 219 Mich App 578, 588; 557 NW2d 157 (1996). Therefore, upon a review de novo, we conclude that plaintiff's resume and his statement in his affidavit regarding awards for job performance do not establish that plaintiff was qualified for the mortgage cashier position.

Plaintiff further argues that based on his performance evaluations, his productivity not only met, but exceeded defendant's expectations. Plaintiff states that his evaluations from 1996 through 2001 contain no evidence of insubordination or his failure to meet production standards. However, we note that these evaluations also were not submitted below by either plaintiff or defendant. Because these evaluations were not properly presented to the trial court, we will not consider them. *Pena, supra* at 310.

Plaintiff further argues that the "daily stats log totals," which were attached to defendant's motion for summary disposition, contain numerous errors, demonstrating that these documents should not have been given any weight by the trial court. Plaintiff provides a partial summary of the many errors. However, this argument was not made below. Because this argument was not raised by plaintiff below, and not addressed by the trial court, it is not preserved for appellate review. *Camden v Kaufman,* 240 Mich App 389, 400, n 2; 613 NW2d 335 (2000).

In light of the evidence present by defendant in the form of affidavits and deposition testimony from Wagener, Allen, Baker and Burton, and the lack of countervailing evidence from plaintiff, plaintiff has failed to show by a preponderance of the evidence that he was qualified for the position. Plaintiff, thus, failed to establish a prima facie case of age discrimination. Therefore, we find, upon a review de novo, the trial court did not err in granting summary disposition in favor of defendant regarding the age discrimination claim.

Plaintiff contends that the trial court erred in granting summary disposition in favor of defendant on his claim of retaliation. We disagree.

MCL 37.2701(a), of the Michigan's civil rights act, provides the following:

> Two or more persons shall not conspire to, or a person shall not:
>
> (a) Retaliate or discriminate against a person because the person has opposed a violation of this act, or because the person has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under this act.

"A prima facie case of retaliation can be established if a plaintiff proves: (1) that he was engaged in a protected activity; (2) that this was known by the defendant; (3) that the defendant took an employment action adverse to the plaintiff; and (4) that there was a causal connection between the protected activity and the adverse employment action." *Pena, supra* at 310-311. "Although no one factor is dispositive in establishing a causal connection, evidence that defendant treated the plaintiff differently from similarly situated employees or that the adverse action was taken shortly after the plaintiff's exercise of protected rights is relevant to causation." *Nguyen v City of Cleveland*, 229 F3d 559, 563 (CA 6, 2000). *Id.* A plaintiff must show that his participation in the protected act was a "significant factor" in the employer's adverse employment action, not merely that there was a causal link between the two. *Barrett v Kirtland Community College*, 245 Mich App 306, 315; 628 NW2d 63 (2001).

The trial court, in the present case, found no causal connection between plaintiff's January 2001 letter to Wagener and his discharge in November 2001. Rather, the trial court stated that the record showed that defendant's concerns about plaintiff's performance predated his letter to Wagener. Plaintiff argues that the trial court erred in granting summary disposition because a question of fact existed as to whether there was a causal link between plaintiff's January 2001 letter, the negative performance review one week later, and the subsequent discharge in November 2001.

Plaintiff's argument relies on the fact that he received the unsatisfactory review just one week after he wrote the letter to Wagener. In *West v General Motors Corp*, 469 Mich 177, 184-187; 665 NW2d 468 (2003) our Supreme Court analyzed what proofs are necessary to establish a "causal connection" between protected activity and an adverse employment action. In doing so, the Court concluded that a plaintiff "must show something more than merely a coincidence in

time between protected activity and adverse employment action." *Id*. at 186. And, the Court held that "[t]he fact that a plaintiff engages in 'protected activity' under the Whistleblowers' Protection Act does not immunize him from otherwise legitimate, or unrelated, adverse job action." *Id*. at 187.[1]

Also, the Sixth Circuit has addressed whether temporal proximity between the protected activity and the adverse action, in and of itself, is sufficient to establish a causal connection. In *Cooper v City of North Olmsted,* 795 F2d 1265, 1272 (CA 6, 1986), the district court found that Cooper filed discrimination charges with the Ohio Civil Rights Commission on February 15, 1980, and the city received a copy of these charges on February 25, 1980. The district court stated that Cooper was then "immediately cited for myriad of alleged violations of NOMBL rules," and that those citations culminated in the discharge of Cooper. *Id.* Based on this evidence, the district court concluded that Cooper established a prima facie case of retaliatory discharge. *Id.* The Sixth Circuit found that the district court's factual findings did not support its conclusion that Cooper established a causal link. *Id.* The court stated that the mere fact that Cooper was discharged four months after filing a discrimination claim was insufficient to support an inference of retaliation. *Id.* The court reasoned that the record contained no evidence directly linking the nine citations to Cooper's filing of discrimination charges. *Id.* The court stated that "[w]hile a disparity in the amount of disciplinary action may certainly be sufficient in appropriate cases to support an inference of retaliation, this is not such a case." *Id.*

In *Nguyen, supra* at 567, the Sixth Circuit found that the plaintiff did not present any evidence that could reasonably support an inference that the defendant's nonpromotion of the plaintiff was in retaliation for his filing charges of discrimination with the EEOC. The court reasoned that temporal proximity alone was not particularly compelling because the plaintiff's retaliation case was otherwise weak, and there was substantial evidence supporting the defendant's version of the events. *Id.* The court noted that while there may be circumstances where evidence of temporal proximity alone would be sufficient to support that inference, that was not the case at hand. *Id.*

In this case, plaintiff's receipt of the unsatisfactory review approximately one week after writing the letter to Wagener is insufficient to support the inference of retaliation. See *West, supra;* see also *Nguyen, supra.* Wagener's testimony regarding the timing of unsatisfactory evaluations, along with Allen's affidavit explaining that she had counseled plaintiff about his extensive errors during the fall and early winter of 2000, support defendant's version of the events. In addition, plaintiff's termination did not occur until approximately ten months after plaintiff wrote the letter, and thus, is not sufficient to support an inference of retaliation, based on the case law discussed above.

The Sixth Circuit has found that temporal proximity, along with other documentary evidence can be sufficient to support an inference of retaliation. See *Harrison v Metropolitan Government of Nashville,* 80 F3d 1107, 1119 (CA 6, 1996) (where the Sixth Circuit found that

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[1] Although *West, supra,* was a case brought under the Whistleblowers' Act, the Court noted that the claims were analogous to antiretaliation discrimination cases. *West, supra* at 186 n 11.

even though one year and three months had elapsed between the filing of the EEOC charge and the plaintiff's termination, that time lapse, when considered with the evidence that three other employees testified that they feared retaliation and that the supervisor had made repeated comments that he would not hesitate to run employees out of his department, was sufficient to establish a prima facie case of retaliation); *Moore v KUKA Welding Systems,* 171 F3d 1073, 1080 (CA 6, 1999) (where the Sixth Circuit found that the close proximity in time between the adverse action and the protected activity coupled with the evidence of frequent discipline for trivial matters and unwarranted criticism of the plaintiff's work, supported the jury's finding of retaliation); *Abbott v Crown Motor Co, Inc,* 348 F3d 537, 544 (CA 6, 2003) (where the Sixth Circuit stated that two of defendant's statements, i.e., that the parts and service director would "get back at those who had supported the charge of discrimination against he and Crown, at or near the plaintiff's discharge satisfied the element of causation).

To establish the "causation link," plaintiff relies heavily upon his earlier satisfactory performance evaluations. Again, these evaluations were not submitted below, and cannot be considered by this Court. In any event, the February 26, 2001 unsatisfactory performance review indicates that it was plaintiff's poor performance, insubordination and explicit refusal to try to meet production standards in 2001 that led to his termination. We find no genuine issue of material fact exists as to whether plaintiff's letter was a "significant factor" in his unsatisfactory review or with regard to his discharge. *Barrett, supra* at 315. Therefore, we conclude, upon a review de novo, that the trial court did not err in granting summary disposition in favor of defendant on the retaliatory discharge claim because plaintiff failed to demonstrate a causal connection between his January 2001 letter, the unsatisfactory review and the subsequent discharge.

Plaintiff next contends that the trial court abused its discretion in dispensing with oral arguments. We disagree.

MCR 2.119(E)(3) specifically authorizes the court, in its discretion, to dispense with oral arguments with regard to motions for summary disposition. *American Transmission, Inc v Channel 7 of Detroit, Inc,* 239 Mich App 695, 709; 609 NW2d 607 (2000). This Court has found no abuse of discretion "where the trial court was fully apprised of the parties' position, by way of the parties' briefs, before rendering a decision." *Fast Air, Inc v Knight,* 235 Mich App 541, 550; 599 NW2d 489 (1999). In the present case, defendant submitted its motion for summary disposition and brief in support of that motion, along with numerous exhibits. Plaintiff responded to defendant's motion, and submitted his documentary evidence. Therefore, we find that the trial court did not abuse its discretion because it was apprised of the parties' positions by way of the briefs and documentary evidence.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Kathleen Jansen
/s/ Michael J. Talbot